

Mark G. Krum  
Nevada Bar #10913  
mkrum@lrrlaw.com  
LEWIS ROCA ROTHGERBER LLP  
3993 Howard Hughes Pkwy., Suite 600  
Las Vegas, NV 89169  
+1 702 949 8217  
+1 702 216 6234

Randall W. Bodner (*Admitted Pro Hac Vice*)  
John P. Bueker (*Admitted Pro Hac Vice*)  
ROPES & GRAY LLP  
Prudential Tower, 800 Boylston Street  
Boston, Massachusetts 02199-3600  
+1 617 951 7000  
+1 617 951 7050

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

OAKTREE CAPITAL MANAGEMENT, L.P., on behalf of its managed funds and accounts, LAZARD ASSET MANAGEMENT LLC, on behalf of its managed funds and accounts, ANGELO, GORDON & CO., L.P., ZAZOVE ASSOCIATES LLC, on behalf of certain of its managed funds and accounts, CNH PARTNERS, LLC, ADVENT CAPITAL MANAGEMENT, LLC, AQR CAPITAL MANAGEMENT, LLC, HFR CA LAZARD RATHMORE MASTER TRUST, and DELAWARE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Case No. 2:12-cv-00956-JCM-(GWF)

**JOINT MOTION FOR, AND POINTS  
AND AUTHORITIES IN SUPPORT  
OF, THE FINDING OF A GOOD  
FAITH SETTLEMENT, ENTRY OF A  
CONTRIBUTION BAR ORDER AND  
FINAL JUDGMENT PURSUANT TO  
RULE 54(b) AS TO MORGAN  
STANLEY**

## Plaintiffs,

V.

KPMG, KPMG INTERNATIONAL  
COOPERATIVE, KPMG LLP, HANSEN,  
BARNETT & MAXWELL, P.C., and MORGAN  
STANLEY & CO.,

## Defendants.

1                   Plaintiffs Oaktree Capital Management, L.P., Lazard Asset Management LLC, Angelo,  
 2 Gordon & Co., L.P., Zazove Associates, LLC, Advent Capital Management, LLC, HFR CA  
 3 Lazard Rathmore Master Trust, and Delaware Public Employees' Retirement System  
 4 (collectively "Plaintiffs") and Defendant Morgan Stanley & Co. LLC ("Morgan Stanley"), on its  
 5 own behalf and on behalf of all underwriters participating in ShengdaTech, Inc.'s  
 6 ("ShengdaTech") December 2010 issuance of 6.5% notes in a private, unregistered debt offering  
 7 (the "Offering") (collectively, the "Underwriters"), hereby jointly move this Court for an Order  
 8 (i) entering a finding that the Stipulation and Agreement of Settlement ("Settlement Agreement")  
 9 between the Plaintiffs and the Underwriters in the action captioned *Oaktree Capital Management,*  
 10 *L.P. v. KPMG*, Civ. Act. No. 2:12-cv-00956-JCM(GWF) (the "Action") was entered into in good  
 11 faith pursuant to N.R.S. 17.245; (ii) entering a Contribution Bar (as defined below); (iii)  
 12 dismissing Plaintiffs' claims against Morgan Stanley on the merits with prejudice; and (iv)  
 13 entering a final judgment as to Morgan Stanley pursuant to Fed. R. Civ. P. 54(b). A Proposed  
 14 Order is attached hereto as Exhibit A.

15                   **MEMORANDUM OF POINTS AND AUTHORITIES**

16                   **I. BACKGROUND**

17                   On June 6, 2012, Oaktree Capital Management, L.P.; Lazard Asset Management LLC;  
 18 Angelo, Gordon & Co. L.P.; Zazove Associates, LLC; CNH Partners, LLC; Advent Capital  
 19 Management, LLC; AQR Capital Management, LLC; and HFR CA Lazard Rathmore Master  
 20 Trust filed an action in this Court alleging violations of state and federal securities laws by  
 21 Morgan Stanley; KPMG, a Hong Kong Partnership; KPMG International Cooperative; KPMG  
 22 LLP; and Hansen, Barnett & Maxwell P.C. (collectively, the "Defendants"), captioned *Oaktree*  
 23 *Capital Management, L.P. v. KPMG*, Civ. Act. No. 2:12-cv-00956-JCM(GWF) (the "Oaktree  
 24 Complaint"). Also on June 6, 2012, the Delaware Public Employees' Retirement System filed a  
 25 separate action against the Defendants in this Court alleging similar facts and allegations as the  
 26 Oaktree Complaint, captioned *Delaware Public Employees' Retirement System v. KPMG*, Civ.  
 27 Act. No. 2:12-cv-00961-JCM(GWF) (together with the Oaktree Complaint, "the Complaints").

1           Each of the Defendants separately moved to dismiss the Complaints, but on November 13,  
 2 2012, before the parties had completed their briefing on the Defendants' motions to dismiss the  
 3 Complaints, Plaintiffs filed a stipulation with the Court to consolidate the two cases. The Court  
 4 granted this request and on November 21, 2012, Plaintiffs filed a Consolidated Amended  
 5 Complaint (the "CAC") against the Defendants in this Action.<sup>1</sup> The CAC generally alleges,  
 6 among other things, that Morgan Stanley made common law negligent misrepresentations and  
 7 violated California Corporations Code §§ 25401 and 25501 in connection with the Offering.  
 8 While Plaintiffs asserted claims under the federal securities laws against other Defendants in the  
 9 Action, Plaintiffs' claims against Morgan Stanley in the CAC were solely pursuant to state law.

10           On January 7, 2013, the Defendants separately moved to dismiss the CAC, Plaintiffs  
 11 jointly filed an opposition brief on February 21, 2013, and the Defendants separately filed reply  
 12 briefs on March 25, 2013. On August 5, 2013, this Court dismissed the CAC without prejudice.  
 13 Plaintiffs' claims against Morgan Stanley were dismissed, in part, based on a finding that  
 14 Plaintiffs lacked standing to pursue claims on behalf of certain investment funds that Plaintiffs  
 15 managed. The remainder of Plaintiffs' claims against Morgan Stanley were dismissed because  
 16 the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims after  
 17 dismissing Plaintiffs' federal claims against other Defendants.

18           The Court's order dismissing the CAC provides that Plaintiffs may request leave to file an  
 19 amended complaint within forty-five (45) days after the date of the order (*i.e.*, by September 19,  
 20 2013). Plaintiffs' counsel have informed Morgan Stanley's counsel that Plaintiffs intend to  
 21 request leave to file an amended complaint that cures the deficiencies noted in the Court's  
 22 dismissal order.

23           In lieu of continued litigation between them, Plaintiffs, on their behalf and on behalf of the  
 24 funds they manage (the "Managed Funds," as the term is defined in the Stipulation and  
 25 Agreement of Settlement), and Morgan Stanley, on own its behalf and on behalf of all the

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26           <sup>1</sup> Two Plaintiffs, CNH Partners, LLC and AQR Capital Management, LLC, are not alleging  
 27 claims against Morgan Stanley in the CAC and therefore are not parties to the Settlement  
 28 Agreement.

1 Underwriters in the Offering, have agreed to resolve and settle the claims between them in the  
2 Action on the terms and subject to the conditions set forth in the Settlement Agreement, attached  
3 hereto as Exhibit B (the "Settlement").

4 **II. THE PROPOSED SETTLEMENT**

5 Plaintiffs and Morgan Stanley have separately and independently determined, after an  
6 assessment of the risks of litigation and the possible outcomes in this Action, and after  
7 consultation with competent counsel, that it is in each of their interests to settle this Action and all  
8 related claims. Under the terms of the Settlement, Morgan Stanley has agreed to pay Plaintiffs  
9 \$5,000,000 (the "Settlement Amount") and to release any and all claims that could be asserted  
10 against Plaintiffs in connection with the Action or the facts alleged in the Action (the  
11 "Underwriters' Released Claims"), as set forth in greater detail in the Settlement Agreement.

12 In exchange, Plaintiffs have agreed to release Morgan Stanley and the other Underwriters  
13 from any and all claims that Plaintiffs have asserted or could have asserted against Morgan  
14 Stanley and the Underwriters arising out of or related to the Offering, and any and all claims  
15 against Morgan Stanley arising out of or related to the facts alleged in the Action (collectively  
16 with the Underwriters' Released Claims, the "Released Claims"), also as set forth in greater detail  
17 in the Settlement Agreement.

18 In addition, as a part of their Settlement, the Parties agreed to seek a Contribution Bar  
19 Order as contemplated by N.R.S. 17.245.

20 **III. LEGAL ARGUMENT**

21 **A. The Settlement Agreement Between Plaintiffs and Morgan Stanley Has Been  
22 Made in Good Faith**

23 To effectively, finally, and forever settle this Action and all related claims, Plaintiffs and  
24 Morgan Stanley, on its own behalf and on behalf of the Underwriters, jointly request that the  
25 Court approve their settlement as being in good faith pursuant to N.R.S. 17.245. N.R.S. 17.245  
26 provides:

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28

1 When a release or a covenant not to sue or not to enforce  
 2 judgment is given in good faith to one of two or more persons  
liable in tort for the same injury or the same wrongful death:

- 3 (a) It does not discharge any of the other tortfeasors from  
 4 liability for the injury or wrongful death unless its terms  
 5 so provide, but it reduces the claim against the others to  
 6 the extent of any amount stipulated by the release or the  
 7 covenant, or in the amount of the consideration paid for it,  
 8 whichever is the greater; and  
 9  
 10 (b) It discharges the tortfeasor to whom it is given from all  
liability for contribution and for equitable indemnity to  
any other tortfeasor.

10 Nev. Rev. Stat. § 17.245 (emphasis added).

11 In determining whether a settlement is made in good faith, the Court must look to the  
 12 policy behind N.R.S. 17.245. N.R.S. 17.245 was enacted to encourage settlement by discharging  
 13 all liability for contribution by a settling tortfeasor. *See In re MGM Grand Hotel Fire Litig.*, 570  
 14 F. Supp. 913, 926 (D. Nev. 1983) (holding that settlement was reasonable and in good faith). A  
 15 determination that a settlement is in good faith precludes the non-settling tortfeasors from later  
 16 seeking contribution or equitable indemnification from the settling tortfeasor. *See Nev. Rev. Stat.*  
 17 § 17.245; *In re MGM*, 570 F. Supp. at 927; *Velsicol Chem. Corp. v. Davidson*, 811 P.2d 561, 562  
 18 (Nev. 1991) (affirming trial court's approval of settlement as in good faith). The determination of  
 19 whether a settlement agreement was entered into in good faith is left to the sound discretion of the  
 20 trial court and will not be disturbed on appeal absent an abuse of discretion. *Velsicol*, 811 P.2d at  
 21 561.

22 Although Nevada Courts have held that there are no exclusive criteria that the Court must  
 23 consider in determining whether a settlement is entered in good faith, relevant factors the Court  
 24 may consider include:

- 25 1. The amount paid in settlement;  
 26 2. The allocation of the settlement proceeds among the  
 27 plaintiffs;  
 28 3. The insurance policy limits of the settling defendants;

4. The financial condition of settling defendants; and
  5. The existence of collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants.

*See id.* at 563-564 (citing *In re MGM*, 570 F. Supp. at 927) (noting that the party challenging the settlement “failed to show that the settlement amount agreed to by [the settling defendant] is disproportionately lower than [its] fair share of damages”).

As discussed below, the Settlement Amount fully satisfies all of the considerations discussed in *Velsicol* and *In re MGM*. Accordingly, the Court should find that the Settlement is fair, reasonable, and has been made in good faith.

## 1. The Amount Paid In Settlement

The Settlement Amount agreed upon between Plaintiffs and Morgan Stanley is fair and reasonable. As an initial matter, Morgan Stanley has agreed to pay Plaintiffs a sum of \$5,000,000 in full and final satisfaction of the Released Claims as a result of vigorous and protracted arm's length negotiations. This is a substantial sum of money to recover in a litigation of this kind, and takes into account the uncertainty and expense of further litigation, including a potential risk at trial, which would be lengthy and costly regardless of the merits of Plaintiffs' claims or Morgan Stanley's defenses.

Plaintiffs have alleged that Morgan Stanley made common law negligent misrepresentations and violated California Corporations Code §§ 25401 and 25501 in connection with the Offering. Morgan Stanley moved to dismiss these claims and the Court granted its motion without prejudice, holding among other things that (i) certain Plaintiffs lacked standing to bring their claims, and (ii) all Plaintiffs failed to state a claim for relief under a federal cause of action against the other Defendants, and therefore declining to exercise supplemental jurisdiction over the state law claims alleged against Morgan Stanley, as well as the other Defendants. *See Order Granting Motion to Dismiss at 17-18, 36-37, Oaktree Capital Management, L.P. v. KPMG, Civ. Act. No. 2:12-cv-00956-JCM(GWF) (filed Aug. 5, 2013).* This dismissal, while not extinguishing Morgan Stanley’s potential liability in connection with the Offering, has injected uncertainty into the case. The Court’s order expressly permitted Plaintiffs to request leave to

1 amend their complaint, and Plaintiffs have informed Morgan Stanley that, absent a settlement,  
 2 they intend to do so.

3 **2. The Allocation of Settlement Proceeds Among the Plaintiffs**

4 This factor also fully supports approval of this Settlement as having been made in good  
 5 faith. In this Action, all Plaintiffs share the same Nevada counsel; all but one Plaintiff is  
 6 represented by the same out-of-state counsel, Grant & Eisenhofer P.A., and the other Plaintiff,  
 7 Delaware Public Employees' Retirement System, has worked closely with Grant & Eisenhofer in  
 8 negotiating the Settlement Agreement. So, all Plaintiffs' interests have been represented in the  
 9 settlement negotiations and will continue to be represented in connection with the allocation of  
 10 the settlement proceeds. In addition, the CAC specifically alleges the amount of ShengdaTech  
 11 notes that each Plaintiff purchased in the Offering, such that there is a readily available and  
 12 objectively reasonable means of allocating the settlement proceeds among the Plaintiffs. This is  
 13 not a case where there are concerns about Plaintiff's who have suffered disparate harms.

14 **3. The Insurance Policy Limits of the Settling Defendants**

15 Morgan Stanley does not have any insurance available to fund this Settlement. Despite  
 16 the fact that this Court has dismissed without prejudice Plaintiffs' claims against Morgan Stanley,  
 17 Plaintiffs have indicated that they will seek leave to amend their complaint. Morgan Stanley is, as  
 18 an initial matter, paying the considerable sum of \$5,000,000 out of its own pocket in order to  
 19 bring closure to this matter. The lack of available insurance proceeds, particularly given the  
 20 current posture of this case, is yet another factor in support of finding that the Settlement  
 21 Agreement was made in good faith.

22 **4. The Financial Condition of the Settling Defendants**

23 Along with the other Underwriters, Morgan Stanley is obviously a large and well-known  
 24 financial institution. However, in the public and private offerings of securities in which it  
 25 participates, it earns an underwriting fee from the company issuing the securities. Here, the  
 26 Settlement Amount represents *nearly all* of the proceeds that Morgan Stanley earned in the  
 27 Offering, which is yet another factor demonstrating the fair and reasonable nature of the  
 28 Settlement Agreement.

## 5. The Existence of Collusion, Fraud, or Tortious Conduct

Finally, there has been no collusion or fraud involved in this Settlement, and certainly no intent to injure any non-settling Defendants, all of whom have also been dismissed from this case on the basis of the Court’s recent Order and none of whom have asserted any contribution or indemnity claims against Morgan Stanley or the Underwriters. *See In re MGM*, 570 F. Supp. at 928 (“Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive when it is aimed to injure the interests of an absent tortfeasor.”) (internal quotation omitted). This negotiation was entered into at arm’s length, among sophisticated counsel with significant experience in representing parties in these kinds of matters. The extensive discussions among the parties and the multiple demands and counteroffers that were exchanged led to a Settlement Amount that all Settling Parties agree is fair and reasonable. The presence of extensive arm’s length negotiations has been considered a critical fact in determining whether a settlement agreement is reached in good faith. *See id.* (holding that a settlement was entered in good faith in view of the “extensive arms-length negotiations” between the plaintiffs and the settling defendants, and that the settlement, thus, “bar[red] any non-settling defendant from a claim of contribution against [the settling defendant] pursuant to N.R.S. 17.245”). In turn, the circumstances under which Plaintiffs and Morgan Stanley negotiated this Settlement Agreement further support its good faith nature.

\* \* \*

Based on the foregoing considerations and the entire record before the Court, Plaintiffs and Morgan Stanley, on its own behalf and on behalf of the Underwriters, jointly request that the Court approve the Settlement Agreement as being in good faith pursuant to N.R.S. 17.245 and, pursuant to the Settlement Agreement, dismiss with prejudice Plaintiffs' claims against Morgan Stanley.

In connection with the Court's approval of the Settlement Agreement as being made in good faith, the Plaintiffs and Morgan Stanley further request that the Court enter an order that Morgan Stanley and the other Underwriters are discharged from all claims for contribution and for equitable indemnity to any person or entity, including other Defendants named in this Action,

1      whether arising under state, federal or common law, based upon, arising from, relating to or in  
 2      connection with the Released Claims, as further defined in the Settlement Agreement (the  
 3      "Contribution Bar Order"). The proposed Contribution Bar Order is in accordance with N.R.S.  
 4      17.245, which provides that "[w]hen a release or a covenant not to sue or not to enforce judgment  
 5      is given in good faith to one of two or more persons liable in tort for the same injury or the same  
 6      wrongful death . . . [i]t discharges the tortfeasor to whom it is given from all liability for  
 7      contribution and for equitable indemnity to any other tortfeasor."

8      **B.      A Rule 54(b) Judgment Is Warranted**

9      Plaintiffs and Morgan Stanley also request that the Court certify as a final judgment,  
 10     pursuant to Fed. R. Civ. P. 54(b), its order dismissing Plaintiffs' claims against Morgan Stanley  
 11     and entering the Contribution Bar Order. Federal Rule of Civil Procedure 54(b) states:

12     **(b) Judgment on Multiple Claims or Involving Multiple**  
 13     **Parties.** When an action presents more than one claim for  
relief—whether as a claim, counterclaim, crossclaim, or  
third-party claim—or multiple parties are involved, the court may  
direct the entry of a final judgment as to one or more, but fewer  
than all, claims or parties only if the court expressly determines  
that there is no just reason for delay. Otherwise, any order or  
 14     other decision, however designated, that adjudicates fewer than  
 15     all the claims or the rights and liabilities of fewer than all the  
 16     parties does not end the action as to any of the claims or parties  
 17     and may be revised at any time before the entry of judgment  
 18     adjudicating all claims and all the parties rights and liabilities.

19     Fed. R. Civ. P. 54(b) (emphasis added). Here, there is no just reason for delaying the entry of a  
 20     final judgment with respect to Plaintiffs' claims against Morgan Stanley. The Settling Parties  
 21     have finally resolved all of these claims by agreement. If any other party to the Action believes  
 22     the settlement was not entered in good faith, the party should so state now. The interest of  
 23     promoting settlements will be furthered by the entry of a final judgment as to Plaintiffs' claims  
 24     against Morgan Stanley.

25     Precedent exists for the entry of a final judgment with respect to Morgan Stanley in these  
 26     circumstances. In *Velsicol*, for example, the settling defendant sought and was granted a final  
 27     judgment under Nev. R. Civ. P. 54(b). *See* 811 P.2d at 562. A non-settling defendant appealed

1 from the court's orders. While not specifically addressed by the Nevada Supreme Court, the  
2 Court implicitly concluded that the Rule 54(b) certification was appropriate by reaching the  
3 merits of the appeal.

4 Here, once the Court approves the settlement as being in good faith and enters the  
5 Contribution Bar Order, it resolves all claims against Morgan Stanley and the Underwriters.  
6 There is no just reason for delay, and therefore the parties request that the Court certify as final its  
7 order dismissing Plaintiffs' claims against Morgan Stanley and entering the Contribution Bar  
8 Order.

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#### IV. CONCLUSION

Based upon the foregoing, Plaintiffs and Morgan Stanley, on its own behalf and on behalf of the Underwriters, jointly respectfully request that the Court: (1) enter an Order in the form attached hereto as Exhibit A, dismissing with prejudice all claims in the Action against Morgan Stanley, approving the Settlement Agreement as being in good faith, and entering the Contribution Bar Order; and (2) find that no just reason exists to delay and, thus, certify the Order as a final judgment as to Morgan Stanley pursuant to Fed. R. Civ. P. 54(b).

DATED: September 6, 2013

/s/ *Megan D. McIntyre*

Stuart M. Grant  
Megan D. McIntyre  
GRANT & EISENHOFER P.A.  
123 Justison Street  
Wilmington, DE 19801

*Attorneys for Plaintiffs Oaktree Capital Management, L.P., Lazard Asset Management LLC, Angelo, Gordon & Co., L.P., Zazove Associates, LLC, Advent Capital Management, LLC, and HFR CA Lazard Rathmore Master Trust*

/s/ *Karl Nielson*

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Gary R. Goodheart  
Amanda J. Cowley  
Karl Nielson  
**FENNEMORE CRAIG JONES VARGAS**  
300 S. Fourth Street, Suite 1400  
Las Vegas, NV 89101  
Telephone: (702) 692-8000  
Facsimile: (702) 692-8099

*Attorneys for Plaintiff Delaware Public Employees' Retirement System*

*/s/ John P. Bueker*

Randall W. Bodner  
John P. Bueker  
Ropes & Gray LLP  
Prudential Tower, 800 Boylston Street  
Boston, MA 02199  
(617) 951-7000

*Attorneys for Defendant Morgan Stanley & Co. LLC*

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Joint Motion For, And Points And Authorities In Support Of, The Finding Of A Good Faith Settlement, Entry Of A Contribution Bar Order And Final Judgment Pursuant To Rule 54(b) As To Morgan Stanley was served on September 6, 2013 by causing a true copy of same to be transmitted by CM/ECF Electronic Filing System to the parties listed on the docket.

/s/ John P. Bueker  
John P. Bueker  
ROPS & GRAY LLP